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Supreme Court, U.S.
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U.S. Supreme Court No. 03-352

IN THE UNITED STATES SUPREME COURT

On Petition for Writ of Certiorari from the Michigan Supreme Court

WILLIAM YEE, Petitioner, vs. SHIAWASSEE COUNTY BOARD OF COMMISSIONERS, Respondent,

and

WILLIAM R. YEE, Petitioner, vs. GEORGE BRAIDWOOD, II (JR.), et al, Respondents

and

WILLIAM YEE, Petitioner, vs. DONALD G CUMMINGS, et al, Respondents

and

IN THE MATTER OF:
Determination of a Lake Level
for the Waters of Bambi Lake,
Bennington Township,
SHIAWASSEE County, Michigan,
WILLIAM YEE, Petitioner, and SHIAWASSEE COUNTY BOARD OF COMMISSIONERS, et al, Respondents,

RESPONDENTS CUMMINGS, FAYLING & CALL, ETAL RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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16 pp

STATEMENT OF QUESTIONS PRESENTED

I. **HAS APPLICATION OF MICHIGAN'S INLAND LAKE LEVELS ACT WORKED AN UNCONSTITUTIONAL TAKING AGAINST PETITIONER YEE?**

Petitioner states	**Yes**
Respondents state	**No**
Trial Court stated	**No**
Michigan Court of Appeals stated	**No**

II. **DID THE YEE COURT OF APPEALS ERR IN REFUSING TO FOLLOW ARNOLD V ELLIS, 5 MICH APP 101 (1966)?**

Petitioner states	**Yes**
Respondents state	**No**

III. **DID THE YEE TRIAL COURT ABUSE ITS DISCRETION IN SANCTIONING PETITIONER FOR THE FILING OF SUBSEQUENT ACTIONS INVOLVING THE SAME ISSUES AND PARTIES AS YEE?**

Petitioner states	**Yes**
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TABLE OF CONTENTS

STATEMENT OF QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

INDEX OF AUTHORITIES iii

STATEMENT OF FACTS AND PROCEEDINGS 1

I. HAS APPLICATION OF MICHIGAN'S INLAND LAKE LEVELS ACT WORKED AN UNCONSTITUTIONAL TAKING AGAINST PETITIONER YEE? 5
A) 5
B) 6
C) 7
Conclusion 8

II. DID THE YEE COURT OF APPEALS ERR IN REFUSING TO FOLLOW ARNOLD V ELLIS, 5 MICH APP 101 (1966)? 9
Conclusion 11

III. DID THE YEE TRIAL COURT ABUSE ITS DISCRETION IN SANCTIONING PETITIONER FOR THE FILING OF SUBSEQUENT ACTIONS INVOLVING THE SAME ISSUES AND PARTIES AS YEE? 12

CONCLUSION AND PRAYER FOR RELIEF 13

INDEX OF AUTHORITIES

Cases

_____ Mich _____; 653 NW 2d 413 (Table)(2002) 4
468 Mich _____ (2003); 664 NW2d 212 (Table)
(2003) 4
468 Mich 852 (2003) 4
Arnold v Ellis, 5 Mich App 101 (1966) 9, 10
Buziashvili v Inman, 106 F 3d 709 (CA 6, 1997) 12
College Savings Bank v Florida Prepaid. . ., 527 US 666,
119 S Ct 2219, 144 L Ed 2d 605 (1999) 7
Jefferson v City of Tarrant, Alabama, 522 US 75,
118 S Ct 481, 139 L Ed 2d 433 (1997) 10
Lawrence v Texas, 123 S Ct 2472, 156 L Ed 2d 508
(2003). 10
Mack v City of Detroit, 467 Mich 186 (2002) 10
Yee v Shiawassee County Board of Commissioners,
et al, 251 Mich App 379 (2002) 4, 5, 9, 10, 12

Statutes

MCL 324.30101 4

Rules

MCR 2.116(C)(7) 3
MCR 2.403 2
MCR 7.203(B) 3
MCR 7.204 4
MCR 7.302 4

STATEMENT OF FACTS AND PROCEEDINGS

In the late 1960's, Forest Cummings and a partner owned a large parcel of land in southern Shiawassee County. In order to enhance its value for development purposes, it was decided to build a dam, thus creating Bambi (or Cummings) Lake. To this end, the property was surveyed and an application for dam permit prepared. Following issuance of the permit construction on the retaining dam and spillway commenced.

The surface level elevation of Bambi Lake can be controlled in two fashions:

1) Two discharge pipes and control valves which go through the dam, and

2) A spillway with removable stop logs.

As a practical matter, surface elevation was controlled by use of the spillway by adding or removing stop logs as necessary. Louis Homola, who assisted in the construction of the spillway and also maintained it for a number of years once Forrest Cummings became too enfeebled to do so has testified that the lake level was always maintained by keeping all stop logs in the spillway structure. Stop logs were removed only to accommodate additional water caused by winter or spring thaws and unusually heavy rains.

Appellant Yee's predecessor in interest, Dr. Michaels, was one of the first persons to build on the lake. Her home, located on the lowest lot abutting the lake, was built in approximately 1974. Dr. and Mrs. Yee purchased the home from the Michaels Trust in 1986. During the summer of 1993, the Yees began a series of improvements, including a new three-car garage with extensive attached driveway. Shortly thereafter, in July, 1994, they claim to have begun

experiencing the problems. Specifically, they noted cracks appearing in their basement floor with moisture "weeping" up through those cracks. They also claim that, beginning in late 1993, the Respondents/Appellees Cummings, et al, conspired to maintain a higher lake level by maintaining more stop logs in the control structure.

On June 14, 1996, Dr. and Mrs. Yee were divorced. Prior to that time, presumably so that he could maintain lawsuits in his own name, Mrs. Yee quit claimed her interest in the subject premises to Dr. Yee.

On January 1995 Dr. Yee filed the first of three lawsuits relating to Bambi Lake (hereinafter the "1995 action"). In the 1995 action, Dr. Yee sought two remedies:

1) Money damages for trespass/nuisance;

2) Enforcement as the "normal" lake level of the 799-foot crest elevation set forth in the dam permit.

Upon completion of discovery, the claim for money damages was submitted to mediation. All parties accepted mediation. Judgments pursuant to MCR 2.403 were entered by the Court. Each of the Defendants tendered payment of the respective judgment amounts to the clerk pursuant to MCR 2.620, and satisfactions thereof were entered.

Trial on the remaining issue of the "normal" lake level was scheduled to commence on January 19, 1999. In preparation therefore, trial briefs and trial motions were filed by Defendants as well as the Michigan DNR/DEQ. The court heard argument on these pretrial motions on the morning of trial. Following argument, the court dismissed the balance of the 1995 action finding:

1) It lacked subject matter jurisdiction to set a "normal" lake level, Plaintiff/Appellant's exclusive remedy being pursuit of the statutorily mandated process set forth in the Inland Lake Level Act, and

2) Even if the court had subject matter jurisdiction, and even if Plaintiff/Appellant was correct and the 1970 dam permit imposed upon Forrest Cummings an affirmative duty to maintain the lake level in accordance therewith, the recent death of Forrest Cummings left the court without personal jurisdiction over anybody against whom an enforcement order might issue.

In November 1999, Dr. Yee again filed a complaint against Defendants, and others (hereinafter the "1999 action"). In the 1999 action, Dr. Yee sought once again to have the court enforce the 799-foot surface elevation as set forth in the 1970 dam permit as the "normal" lake level. All parties moved for summary disposition pursuant to MCR 2.116(C)(7), claiming that the court's disposition of the 1995 case precluded the 1999 case under rules of *res judicata*. The court granted that motion as to all Defendants.

Following dismissal of the 1999 action, Defendants moved for imposition of actual costs and attorneys fees pursuant to MCLA 600.2591. The court ruled that the 1999 action was frivolous within the meaning of that statute, and imposed actual costs and attorneys' fees.

Appellant Yee made various attempts to appeal the orders of dismissal entered by the trial court in both the 1995 and 1999 actions. Ultimately, by order of the Court of Appeals, the various filings of Appellant were deemed to be applications for leave to appeal pursuant to MCR 7.203(B), and granted said applications. Following briefing and oral argument, the Court of Appeals released its opinion for pub-

lication on May 21, 2002 affirming the trial court. Yee v Shiawassee County Board of Commissioners, et al, 251 Mich App 379 (2002).

Dr. Yee's application for leave to appeal to the Michigan Supreme Court was denied 468 Mich 852 (2003) as was his motion for reconsideration and/or stay of proceedings. 468 Mich _____ (2003); 664 NW2d 212 (Table)(2003).

Following dismissal of the 1995 action, a petition was filed with the Shiawassee County Board of Commissioners pursuant to the so-called Inland Lake Level Act, MCL 324.30101. The matter was tried during the first week of June, 2002, with the court rendering its opinion on the record on June 12, 2002. In that opinion, the court deter-mined the normal lake level of Bambi Lake to be 800.67 feet, the level of the lake with all spillway stop logs in place. An order to this effect was entered by the Court on August 30, 2002. On July 2, 2002, Appellant Yee filed a claim of appeal with the Michigan Court of Appeals pursuant to MCR 7.204. On July 31, 2002, 29 days thereafter, Appellant Yee filed an application for a so-called "bypass" appeal to the Michigan Supreme Court pursuant to MCR 7.302. The application for "bypass" appeal was denied by the Michigan Supreme Court _____ Mich _____; 653 NW 2d 413 (Table)(2002)

I. HAS APPLICATION OF MICHIGAN'S INLAND LAKE LEVELS ACT WORKED AN UNCONSTITUTIONAL TAKING AGAINST PETITIONER YEE?

Petitioner states	**Yes**
Respondents state	**No**
Trial Court stated	**No**
Michigan Court of Appeals stated	**No**

Distilled to its essence, Petitioner's claim is that he has been subjected to an unconstitutional taking of his property, without due process of law, by application of the Inland Lake Levels Act and the proceedings held under it. For numerous reasons, he has not.

A) First and foremost, Petitioner's claim that the ILLA, and its instant application, benefits only private individuals, and not the public generally is unfounded in fact and in law. As noted by the Michigan Court of Appeals in Yee, supra:

> "That Bambi Lake is a private lake similarly does not support plaintiff's claim that initiation of proceedings by a governmental agency under Part 307 [i.e., the ILLA] would amount to an unconstitutional taking of private property for a non-public purpose. As noted above, the statutory proceed-ings for establishment of a normal lake level were devised 'for the protection of the public health, safety and welfare,' as well as 'the conservation of the natural resources of this State.' Even assuming that a governmentally initiated proceeding to determine the normal level of Bambi Lake could constitute a taking of private property, regulation of the lake level directly protects not only those private lands fronting on the lake, but also those public resources and property interests located downstream from the spillway.

> Accordingly, we are not persuaded that governmentally initiated proceeds to determine the normal level of a private lake are constitutionally infirm." Id at 401.

Because of the public interest involved, actions under the ILLA are not constitutionally prohibited as takings.

B) Contrary to his assertions, Petitioner has no "interest" in the property which he claims has or will be taken.

Petitioner draws whatever rights he might have to 5281 Lake Drive, Owosso, Michigan as the grantee by deed. That deed describes the demised property in a metes and bounds description with the easternmost boundary being the meander line of Bambi Lake. As was succinctly pointed out by Judge Tahvonen in announcing his decision in the ILLA action:

> "Once we have that call to the iron stake, we have then another call going south and east for what will be the easterly boundary of Dr. Yee's larger parcel. And that larger parcel, it says, is bounded on the east by the lake. And the line that's shown on the survey is a meander line only used for purposes of broadly describing the general location, configuration, and direction of travel of that eastern boundary. . .

So the only riparian interest exists by virtue of Dr. Yee's easternmost boundary being a body of water. And the purpose of that riparian interest is broadly to make certain that an owner of riparian property, like Dr. Yee, has the benefit of the use of the water.

* * *

What they're talking about in terms of prolongations of the

north and south boundary is an extension of that north boundary line from the point of beginning however far you have to go to get to the water's edge. And then you follow the water's line down in a southeasterly direction to the intersection of the water's edge with the prolongation of the southern boundary. And that's why that easterly boundary will change, it will move. When the lake is low, that boundary will extend further and the distance from what the meander line described in the survey and the actual edge of the lake will expand as the lake drops, contract as the lake rises, and may, on some occasions, actually cross over the meander line. But there is no property interest in the meander line. The property interest is to the lake's edge, wherever that might be. Now sometimes that will intrude upon land within the meander line, there is no cause for objection there because what you bargained for was the edge of the lake as the easterly property boundary, and that's what you have." In Re Bambi Lake, Tr. pp 613-615

Because he has no property interest in the submerged land, there can be no taking as a matter of law. See, for instance, College Savings Bank v Florida Prepaid. . ., 527 US 666, 119 S Ct 2219, 144 L Ed 2d 605 (1999).

C) In any event, Judge Tahvonen found, historically, that Bambi Lake had been maintained at an elevation of 800.67 feet, i.e., with all stop logs in place, since the lake was built in 1970:

> ". . .it is unrefuted that that structure was designed and operated on the assumption that all the stop logs would be in and that that topmost top - topmost portion of the topmost log would establish the elevation of the lake.

> Now it seems to me, then, that the history shows that although the lake level has varied, the lake level has been established with all those stop logs in.
>
> * * *

The issue, you see, isn't what the lake level is on a particular day, the issue is what the configuration of level control structures permit as the lake level at any give[n] in time.

* * *

I am satisfied that it's true that the normal water surface elevation of Bambi or Cummings Lake has historically been maintained at the top of the weir structure, which we now know to be, with all stop logs in place, 800.67 feet." In Re Bambi Lake, Tr. pp 619-20, 622, 627-8

Conclusion

Because the level of Bambi Lake has been maintained at 800.67 feet since its inception (i.e., 1970), there is no factual basis for Petitioner's claim of taking.

The ILLA has as its aim the broad goals of protection of the public health, safety and welfare as well as conservation of the natural resources of this State. Its application, therefore, does not work an unconstitutional taking. This is particularly so in the instant case where Petitioner has no property interest in the subject matter of the alleged "taking", and the manner in which this alleged taking is to take place, i.e., maintaining the level of Bambi Lake at 800.67 feet, is consistent with the historically maintained lake level.

II. DID THE YEE COURT OF APPEALS ERR IN REFUSING TO FOLLOW ARNOLD V ELLIS, 5 MICH APP 101 (1966)?

Petitioner states **Yes**
Respondents state **No**

Although it is somewhat difficult to ascertain Petitioner's next issue, it seems to be that the Michigan Court of Appeals somehow erred in its ruling by refusing to be bound by its decision of over 30 years earlier in Arnold v Ellis, 5 Mich App 101 (1966).

Initially, it should be noted that the Yee court distinguished its prior holding in Arnold:

> "In reaching this conclusion, we recognize that a panel of this Court previously considered the statutory change now found at MCL 324.30702 (1) and concluded that, by providing that the county 'may' - as opposed to 'shall' - seek to initiate proceedings to determine the normal level of an inland lake, the Legislature did not foreclose a private cause of action for this purpose. The panel in *Arnold,* however, failed to consider the comprehensive nature of the statutory scheme employed by the Legislature or the public purpose in devising that scheme, and we therefore reject its conclusion that suit by an individual is not foreclosed." Id at 399-400.

Distinguishing the instant case from one of its prior ruling certainly does not raise an issue of federal law!

Petitioner next indicates that it was inappropriate of the Yee court to decide that, notwithstanding the above-cited distinction, it would not follow the Arnold decision because the case was decided before the effective date of Administrative Order 1990-6. It appears that Petitioner is claiming

that the rule of *stare decisis* is ironclad, and that courts are forever bound by their prior holdings. This is neither the case in Michigan:

> ". . .this Court is mindful of the doctrine of *stare decisis*. *Stare decisis*, however, is not meant to be mechanically applied to prevent the Court from over ruling earlier erroneous decisions. (citation omitted) Rather, *stare decisis* is a 'principal of policy' not 'an inexorable command,' and the Court is not constrained to follow precedent when governing decisions are badly reasoned." Mack v City of Detroit, 467 Mich 186, fn 19 (2002)

nor in this Court:

> "The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command. Payne v Tennessee, 501 US 808, 828, 111 S Ct 2597, 115 L Ed 2d 720 (1991) ("*stare decisis* is not an inexorable command; rather, it 'is a principal of policy and not a mechanical formula of adherence to the latest decision'") (quoting Helvering v Hallock, 309 US 106, 119, 60 S Ct 444, 84 L Ed 604 (1940))" Lawrence v Texas, 123 S Ct 2472, 2483, 156 L Ed 2d 508 (2003).

Whether distinguishing or overruling Arnold, the Yee court was justified in not following it.

In any event, the whole issue of the jurisdiction of the Yee court to determine the normal lake level was rendered moot by the filing of the petition which ultimately led to the trial of the lake level issue in In re Bambi Lake. See, for instance, Jefferson v City of Tarrant, Alabama, 522 US 75, 118 S Ct 481, 139 L Ed 2d 433 (1997).

Conclusion

Although justified in not following Arnold, any error by the Yee court in refusing to do so was rendered moot by the filing of the petition to determine lake level and ultimate trial of that matter in In re Bambi Lake.

III. DID THE YEE TRIAL COURT ABUSE ITS DISCRETION IN SANCTIONING PETITIONER FOR THE FILING OF SUBSEQUENT ACTIONS INVOLVING THE SAME ISSUES AND PARTIES AS YEE?

Petitioner states	**Yes**
Respondents state	**No**
Trial Court stated	**No**
Michigan Court of Appeals stated	**No**

Petitioner next seems to indicate that the sanctions levied against him by the Yee trial court for filing the 1999 and 2000 actions constitute an unconstitutional taking. However, Petitioner makes no reference whatsoever to how this is so. Under such circumstances, this issue must be deemed abandoned on appeal. See, for instance, Buziashvili v Inman, 106 F 3d 709, 719 (CA 6, 1997):

> "Although defendants listed this as an issue, they make no argument in their brief in support of this contention. Therefore, we consider the argument waived."

In any event, the basis for the sanction was well discussed by the Michigan Court of Appeals in Yee. Id at 407-409, and Respondents incorporate that rationale herein.

CONCLUSION AND PRAYER FOR RELIEF

For the reasons stated herein, Respondents pray that the Court deny Petitioner's application for Writ of Certiorari.

Respectfully submitted,

GAULT DAVISON, P.C.

Dated:

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